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# In the Supreme Court of the United States

OCTOBER TERM, 1952

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No. 550

UNITED STATES OF AMERICA, PETITIONER

*v.*

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY and GULF, MOBILE & OHIO RAILROAD COMPANY

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Seventh Circuit (R. C. 64; R. G. 56) [1] affirming judgments dismissing actions to re-

[1] The record with respect to the proceeding involving Chicago, Burlington, & Quincy Railroad Company is referred to herein by the designation "R. C.," and the record with respect to Gulf, Mobile & Ohio Railroad Company by the designation "R. G."

cover penalties for alleged violations of the Safety Appliance Act.

### OPINION BELOW

The opinion of the Court of Appeals (R. C. 58-63; R. G. 50-55) is reported at 199 F. 2d 223.

### JURISDICTION

The judgments of the Court of Appeals were entered October 16, 1952 (R. C. 64; R. G. 56). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

### QUESTION PRESENTED

Whether movements of intact units consisting of an engine and 33 and 23 cars, respectively, in uninterrupted trips of one and a half and two miles, were train movements under the Safety Appliance Act.

### STATUTES AND ORDER INVOLVED

The Act of March 2, 1893, c. 196, 27 Stat. 531, provides:

> Sec. 1 [45 U. S. C. 1] * * * it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic * * * that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed with-

out requiring brakemen to use the common hand brake for that purpose.

* * *

Sec. 6 [45 U. S. C. 6] * * * any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed * * *.

The Act of March 2, 1903, c. 976, 32 Stat. 943, amending the 1893 Act, provides:

Sec. 2 [45 U. S. C. 9] * * * whenever, as provided in said Act [of March 2, 1893, *supra*], any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said Act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and

> operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section.

The order of the Interstate Commerce Commission, dated June 6, 1910 (49 C. F. R. 132.1), provides:

> On and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-brake cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated.

**STATEMENT**

The court below has considered together, in one opinion, two judgments dismissing, after trial, complaints against railroads charging violations of the air-brakes provision of the Safety Appliance Act.

1. The complaint against the Chicago, Burlington & Quincy Railroad, filed in the District Court for the Northern District of Illinois, alleged four causes of action, but it was stipulated and agreed that the movement of cars alleged in the first cause of action was similar to the movements in the other

three causes and that the decision of the court on the first cause should be binding upon the parties as to the other causes (R. C. 47).

The district court found that the movement in question consisted of 23 freight cars drawn by a diesel engine from respondent's Freight House Yard at Aurora, Illinois, for a distance of slightly over two miles, to its West Yard at Eola, Illinois, without power or air brakes in operation an any of the cars (R. C. 47-48). The cars had been assembled in the Freight House Yard and were hauled intact to the Eola yard to be coupled into outgoing trains (R. C. 49-50). No cars were picked up or set out enroute (R. C. 48). The movement was at a speed of eight to ten miles per hour (R. C. 48). The movement was over a "lead track"[2] paralleling respondent's three main tracks and crossed two public crossings, one across a much-traveled street protected by automatic flashing light signals and bells, and the other at a graveled highway, having an open view in all directions. (R. C. 48-49.)

At the Freight House, the lead track was ten feet below the main tracks and was at an ascending grade until it reached a level with the main tracks at the Eola yard. No through passenger train used the lead track, but the "second class" freight trains, Nos. 83 and 84, running between the Eola yard to West Chicago, a short distance beyond

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[2] The term "lead track" was employed in the proceeding below to designate the track leading from the Freight House trackage to the Eola yard.

Aurora, used one and one-half miles of the track daily. These trains did switching beyond Aurora. (R. C. 29, 48.) The entire distance of the lead track was "within the yard limits" of Aurora, and all operations of trains Nos. 83 and 84 and of switch engines were based on an operating rule permitting the track to be used as it was "seen and known to be clear" (R. C. 48-49). The entrance to the main tracks was controlled by interlocking switches, and derails on the lead and entrance tracks protected against trains entering the main-line tracks without proper signal indications (R. C. 49). The movement here in question was under the direction and control of the yardmaster and the engine was manned by a switching crew; no caboose was attached and no train markers were carried (R. C. 49-50.) According to the district court's finding, at the speed at which the train moved, it could be controlled "quickly" by the engineer, using the locomotive brakes, and the cars could be stopped "as quickly" as if the power brakes were available "except in any emergency" (R. C. 48.)

The district court found, as a conclusion of law, that the movement was "a switching movement and not a train movement," and he therefore dismissed the causes of action (R. C. 50).[3]

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[3] The district judge's reasoning is indicated in an oral statement (R. C. 43-45) in which he concluded that "all the facts and circumstances" must be examined. Without attributing decisive force to any one circumstance, he relied on the following aspects: use of a yard crew (R. C. 44), absence of a caboose (R. C. 44), absence of flags to indicate the classification of train (R. C. 44), movement within the limits of one

2. The complaint against the Gulf, Mobile & Ohio Railroad, filed in the Southern District of Illinois, alleged a movement of locomotive and 33 freight cars from its Venice, Illinois, yards to the yards of the Terminal Railroad Association at East St. Louis, Missouri, without brakes in operation on the cars (R. G. 3-4).

The district court found the movement to have covered a distance of approximately one and one-half miles, at the rate of four to five miles per hour, without air brakes in operation on the cars, and no showing appeared that any switching was done enroute, although in similar movements cars not going all the way to the Terminal yards were sometimes switched off to the intermediate portion of the Venice yards (R. G. 42-43). The cars in question had been assembled from four incoming trains and all "were designated for the Terminal Railroad" and by this movement transferred to that railroad's yard (R. G. 42). The movement, until it entered the Terminal yards, was through the Gulf, Mobile & Ohio's Venice yards, which were extensive, and consisted of three sections. Freight trains were made up and broken up in these yards, and the yards adjoined the Terminal yards (R. G. 41.) No trains passed through the Venice yards

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yard, "the Aurora-Eola yard" (R. C. 44), and the use of the track "only for yard purposes" because the two freight trains Nos. 83 and 84 traveled such a short distance beyond the Aurora yard that it was "no more or less than a switching movement" (R. C. 44-45). The district judge considered it "not determinative" that no switching took place in the distance of over two miles and that highways crossed the track (R. C. 45).

(R. G. 42), and the movement here in question crossed no main-line tracks of any railroad. The movement crossed a paved street known as State Route 3, at which a crossing watchman was posted. Since the movement began only 40 to 50 feet from this crossing, the speed at the crossing was only three miles per hour (R. G. 42).

The movement was under yard rules and under control and supervision of the yardmaster, who was located in a tower, and could communicate with crews by a system of loudspeakers, but there was no finding of any communication during the movement (R. G. 41). The movement was drawn by a diesel switch-engine and handled by a switching crew; it was not made pursuant to any regular schedule (R. G. 41). No injury had arisen out of such a movement within the past 40 years (R. G. 42).

The district judge concluded, as a matter of law, that the Gulf, Mobile & Ohio movement "was a yard switching movement and did not constitute a train movement" (R. G. 43), relying primarily, according to his memorandum (R. G. 38), upon the precedent of *United States* v. *Elgin, J. & E. Ry. Co.*, 182 F. 2d 1 (C. A. 7).

On appeal, the court of appeals affirmed both judgments of the district courts, holding the operations in both cases to be switching operations and not to involve train movements. It stated (R. C. 61-62):

> The lack of any uniform definition as to what constitutes a train movement is aptly illustrated by two recent decisions, *United*

*States* v. *South Buffalo R. Co.*, 168 F. 2d 948, decided by the Second Circuit, and *United States* v. *Elgin, J. & E. Ry. Co.*, 182 F. 2d 1, decided by this court. A fine-tooth comb is required to differentiate between the facts of the two cases. The Second Circuit, however, decided that the operation in question was a train movement and reversed the District Court, which had held that it was a switching movement. On the other hand, this court decided on the facts before it that the operation was not a train movement and affirmed the District Court. These two cases with strikingly similar facts but with opposite results are typical of others which could be cited.

REASONS FOR GRANTING THE WRIT

1. a. The passage quoted immediately above shows that the Seventh Circuit itself recognizes that the Second and Seventh Circuits are reaching "opposite results" in cases with "strikingly similar facts." The Second Circuit's decision in *United States* v. *South Buffalo R. Co.*, 168 F. 2d 948, certiorari denied, 335 U. S. 870, involved a movement of 15 cars for two miles entirely within the carrier's yard by a carrier engaged only in yard operations. The only difference in critical facts between that case and those at bar is that a lesser number of cars was hauled in the *South Buffalo* case.

b. The attempted distinction between the *South Buffalo* case and the *Elgin* case relied on below was based on an appraisal of the degrees of danger involved. But this Court has explicitly held this

factor immaterial. In *United States* v. *Northern Pacific Ry. Co.*, 254 U. S. 251, 255, it declared that "Congress has not imposed upon courts applying the act any duty to weigh the dangers incident to particular operations."

Similarly, under the decision below, the trier of fact is allowed to consider other protections afforded at grade crossings in determining whether the movement of cars was dangerous enough to be a "train" within the meaning of the statute. But in *Louisville & Jeffersonville Bridge Co.* v. *United States*, 249 U. S. 534, 539, the Court stated:

> It is argued that coupling of the train brakes was not necessary for the reason that the street crossings used were protected by gates, that a yard master from an elevated tower watched over the main line movements, and that the coupling of the train-brake appliances would involve more danger to the employees than the movement of the cars without their being used and operated. *These suggestions serve to emphasize the dangerous character of the movement. But the construction which the act should receive is not to be found in balancing the dangers which would result* from obeying the law with those which would result from violating it, *nor in considering what other precautions will equal, in the promotion of safety, those prescribed by the act. Such considerations were for Congress when enacting the law* * * *. [Italics supplied.]

Clearly the danger involved cannot determine whether a movement of a number of cars is a train.

Switching movements may well be as dangerous as "train" operations. Particularly incongruous is the apparent weight accorded below to the number of grade crossings and prior accidents in determining whether a particular movement is a train. The court of appeals noted here that in the *Chicago, Burlington & Quincy* case, the track crossed two "public highways" (R. C. 62, R. G. 54), and that in the *Gulf, Mobile and Ohio* case a single state highway was protected by a watchman (R. G. 54). In the *South Buffalo* case the only grade crossing was one "adequately protected" private industrial crossing 168 F. 2d at 950 n. But such factors, and fine distinctions based thereon, can hardly be decisive in interpreting the word "train."

c. The decision below also conflicts with *United States* v. *Southern Pacific Co.*, 60 F. 2d 864 (C. A. 9), certiorari denied, 287 U. S. 667, *Chicago, St. P., M. & O. Railway Co.* v. *United States*, 36 F. 2d 670 (C. A. 8), and *Illinois Central R. Co.* v. *United States*, 14 F. 2d 747 (C. A. 8), certiorari denied, 273 U. S. 752. In the *Southern Pacific* case, the Ninth Circuit held that the Act applied to movements of between 10 and 26 cars for a distance of one mile along a "drag track" between two parts of a yard in San Francisco. In the *Chicago, St. P. M. & O.* case the movement held to constitute a train was of 16 cars for 1¼ miles between parts of a yard. In the *Illinois Central* case, the movement of 18 cars was for slightly less than a mile on a lead track between parts of a yard. The three

cases last cited differ from the instant cases and the *South Buffalo* case only in that there were a larger number of grade crossings.

It is apparent from this analysis of the cases in the courts of appeals that on substantially identical facts the Safety Appliance Act has been applied in the Second, Eighth and Ninth Circuits, but that it is not being applied to railroads in the Seventh Circuit. This in itself would warrant review by this Court in order to insure that the Act be applied uniformly throughout the country. In addition, as we shall show, the decision below disregards the standards of interpretation approved by this Court.

2. The court below has so misconceived the decisions of this Court as to make application of the Safety Appliance Act, in the court's own language, "depend largely upon the opinion or judgment of the court called upon to make a decision", with the result that "the opinion of one judge or court is likely to be as good as that of another" (R. C. 61, R. G. 53). The decision below thus thrusts upon the courts the essentially legislative function of deciding whether power brakes are in their opinion desirable in a particular operation, contrary to the warning of this Court in *Louisville & Jeffersonville Bridge Co.* v. *United States,* 249 U.S. 534, 539, that "the construction which the act should receive is not to be found in balancing the dangers which would result from obeying the law with those which would result from violating it, nor in considering what other precautions will equal, in the promotion

of safety, those prescribed by the act." Moreover, the decision below, in permitting the courts to make the decision as to the applicability of the Act on an *ad hoc* basis depending largely on their concept of danger, permits consideration of all sorts of criteria other than the one fixed by the statute as interpreted by the decisions of this Court, including criteria rejected by this Court. The result of such an interpretation must inevitably be confusion and lessening compliance with the safety provisions prescribed by Congress, a result which the decision below itself demonstrates.

The decisions of this Court leave no room for the *ad hoc* application of the statute and the resulting confusion pictured by the court below. The statute speaks of "any train", and the decisions of this Court have made clear what a train is. In *Louisville & Jeffersonville Bridge Co.* v. *United States,* 249 U.S. 534, which involved a company engaged in operating only a terminal yard, this Court pointed out the nature of the determination to be made in these cases (p. 538):

> An engine and twenty-six cars, assembled and coupled together, not only satisfies the dictionary definition of a "train of cars," but would certainly be so designated by men in general and in any fair acceptation of the term must be regarded as constituting a train within the meaning of the statute. It was a train greater in length than most regularly scheduled trains were when this Safety Appliance Act was passed twenty-six years ago, and even

> yet, probably, exceeds in length, passenger and freight trains considered, more than a majority of the regular road trains in this country.
>
> The work done with the cars, as described, was not a sorting, or selecting, or classifying of them, involving coupling and uncoupling, and *the movement of one or a few at a time for short distances,* but was a transfer of the twenty-six cars as a unit from one terminal into that of another company for delivery, without uncoupling or switching out a single car, and it cannot, therefore, with propriety be called a switching movement. [Italics supplied.]

In *United States* v. *Northern Pacific Ry. Co.*, 254 U.S. 251, this Court disposed of the contention, apparently pieced together from bits of incidental language of earlier decisions, that if the movement was not over a main line no "train" could be said to be involved. Mr. Justice Brandeis, speaking for a unanimous Court, said (at pp. 254-255):

> * * * If use of the road as part of a main line were essential in order that operations on it be controlled by the Safety Appliance Act, the requirement would be satisfied in this case * * *. *But there is nothing in the act which limits the application of the provision here in question to operations on main line tracks. The requirement that train brakes shall be coupled so as to be under engine control is in terms (32 Stat. 943) applicable to "all trains* * * *"* [T]ransfer trains, like those here in-

> volved, are "trains" within the meaning of the act. A moving locomotive with cars attached is without the provision of the act only when it is not a train; as where *the operation* is that of *switching, classifying and assembling cars* within railroad yards for the purpose of making up trains.[4] [Italics supplied.]

See also *United States* v. *Erie R. R.*, 237 U.S. 402, and *United States* v. *Chicago, Burlington & Quincy R.R.*, 237 U.S. 410, both clear holdings that "transfer trains" taking groups of cars "as a unit" (237 U.S. at p. 412) from one place of receiving, breaking-up, assorting, storing, and distributing, to another, were subject to the safety requirement, since their operation was for the transporting of a train of cars and not for the distributing and assembling which would alone be excepted from the brake requirements.

This Court has thus laid down clear and simple criteria of what constitutes the movement of a train within the purview of the Safety Appliance Act. The movement of an assembled group of cars with an engine for an appreciable distance without transferring or adding other cars is the movement of a train for the purposes of the Act. The de-

[4] It may be noted, as against further misunderstanding derived from isolated verbiage, that this quotation does *not* take a movement out of the status of being a train merely because it is "within railroad yards" or is "for the purpose of making up trains." These are not substitutes or alternates for the basic requirement for exemption that the operation itself be a switching operation, since a train of cars hauled across the country "for the purpose of making up trains" at a distant city would nevertheless remain a train, and so, too, would a train passing "within railroad yards."

cision below, in holding that movements here involved, i.e., 23 cars for over two miles, and 33 cars for one and one-half miles, were not movements of trains within the purview of the Act is clearly contrary to the above-cited decisions of this Court.[5]

3. When the decision below is read in conjunction with the earlier opinion of the same court in *United States* v. *Elgin, J. & E. Ry. Co.*, 182 F. 2d 1, on which it largely relied, it is evident that the court below thought that the Supreme Court cases referred to above were not controlling because in the *Elgin* and the instant cases the movements were within a single railroad yard. As we have pointed out, the Second, Eighth and Ninth Circuits have reached a contrary conclusion as to this. Furthermore, in the instant cases, that premise is not supported by the facts. The Chicago, Burlington, and Quincy's yards in Aurora, Illinois and Eola, Illinois were connected by only narrow trackage, even though no signs were posted establishing yard limits between the two substantially separated

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[5] In *United States* v. *Erie R.R.*, 237 U.S. 402, 404, 406, *supra*, each transfer train had about 25 cars and the distance of the trips was from two to three and one-half miles. In *United States* v. *Chicago, Burlington, and Quincy Railroad*, 237 U.S. 410, 411-412, the trains ranged from 36 to 42 cars and the trips were about two miles; in *Louisville & Jeffersonville Bridge Co.* v. *United States*, 249 U.S. 534, 538, a 26-car train moved about three-quarters of a mile; and in *United States* v. *Northern Pacific Railroad Co.*, 254 U.S. 251, 40-car and 48-car trains moved four miles.

The speed of the movement was not mentioned in the *Chicago, Burlington and Quincy* opinion; it was noted in *Erie, Louisville & Bridge*, and *Northern Pacific*, respectively, at seven to eighteen miles per hour, up to 15 miles per hour, and three to eighteen miles per hour.

yards and separate operations. Similarly, an examination of the Gulf, Mobile & Ohio's Exhibits 14 and 15 will disclose that the sections respectively labelled (and correctly so) as Venice *Yard* and Brooklyn *Yard* are separate switching areas connected by trackage apparently adapted for the transfer of assembled groups of cars rather than for assembling or breaking-down operations in themselves. Moreover, the yard to which the Gulf, Mobile & Ohio movement was directed was not even one of Gulf, Mobile & Ohio's yards, but that of the Terminal Railroad Association of St. Louis and was clearly connected only by a transfer track (Gulf, Mobile & Quincy Exhibit 13; R. G. 43). We believe the language of this Court in *United States* v. *Erie Railroad,* 237 U.S. at p. 406 is clearly applicable: "They [the three yards] doubtless are important accessories to the defendant's eastern terminal, but that does not make them one yard. They lie from two to three and one-half miles apart, are not so linked together that cars may be moved from one to another with the freedom which is usual and essential in intra-yards movements, and are in actual practice treated as separate yards."[6]

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[6] The irrelevance of the factor of technical retention of the operation within the nominal limits of a switchyard or lead track is further illustrated by the facts of these cases. A wreck in either of the narrower portions of the yards or lead tracks could spill cars or wreckage onto outside territory or main-line tracks, particularly in such a situation as that of the Gulf, Mobile & Ohio, where the main-line tracks (see Gulf, Mobile & Ohio Exs. 14 and 15) run immediately alongside the tracks upon which the transfer trains operate.

In any event, neither the opinion below nor the prior *Elgin* opinion treats the factor of movement within a single yard as in itself sufficient to distinguish a train movement from a switching operation. Rather, the court below apparently considered the fact of transfer within a single yard as bringing the cases within the "twilight zone" which, in its view, necessitates consideration of the many "particular facts" in each case. Nothing, however, in the opinions of this Court justifies the substitution of the amorphous standard of the court below for the clear and precise definition by this Court of the unlimited statutory term "train" merely because a single yard is involved.

The legislative history of the Act plainly shows that a substantial purpose of the Act was not merely to prevent wrecks but to preclude the necessity of using brakemen atop the cars who were required to man the hand-brakes due to the insufficiency of engine brakes to deal with a train of any length, particularly on a grade. (H. Rep. No. 1678, 52nd Cong., 1st sess., pp. 1, 3, 4-5; S. Rep. 1049, 52nd Cong., 1st sess., 29-31, 109-110.) Thus, the simple standard of whether a number of assembled cars drawn by one engine travels for an appreciable distance is directly related to the danger which Congress was seeking to prevent.

4. Other factors given weight by the court below have been treated as irrelevant by this Court. The fact of passage over a main line was considered significant by the court below in the *Elgin* opinion. It characterized *United States* v. *Northern Pacific*

*Ry. Co.*, 254 U.S. 251, as holding that the "transfers * * * constituted main line transportation in the meaning of the Act" (182 Fed. 1, 3), "whereas the whole effect of the decision (see *supra*, pp. 14-15) was to negate the necessity of main-line transportation to the definition of a "train." The court below in its recital of the facts also mentioned that the cars involved carried no caboose or markers, whereas this Court in the *Chicago, Burlington & Quincy* case, 237 U.S. at p. 413, said:

> * * * That [the trains] carried no caboose or markers is not material. If it were, all freight trains could easily be put beyond the reach of the statute and its remedial purpose defeated. Neither is it material that the men in charge were designated as yard or switching crews, for the controlling test of the statute's application lies in the essential nature of the work done rather than in the names applied to those engaged in it.

The court below also mentioned that switching crews were used for the operation, that the movements were not on a regular schedule, and that the trains were under orders of yardmasters. The opinions, in both *Erie* and *Chicago, Burlington & Quincy, supra,* show that this Court was clearly aware of the use of switching crews, and the absence of regular train markers, and was aware, in those cases and *Northern Pacific* as well, that the movements were not on a necessarily regular schedule. The opinions in *Erie, Louisville,* and *Northern Pacific* also noted that the trains were under

orders of yardmasters, but ascribed no necessary consequence to the fact that only switching operations and not trains could be put through a yard by a yardmaster.

This consistent departure in detail from the holdings of this Court is merely a reflection and necessary consequence of the more basic departure from the simple criteria established by this Court as to what constitutes a train within the meaning of the Act. The court below has substituted for the simple, common-sense definition of train established by this Court, a concept which requires in any doubtful case the weighing of innumerable imponderables without any guiding standards, and leaves the ultimate result largely dependent on the approach to the statute adopted by the individual trier of fact.

The practical effect on enforcement of leaving such considerations to the courts is illustrated by the course of opinions in the court below. In the *Elgin* case, the court found no element of danger, although the trackage involved crossed two private crossings at grade. Thereafter, faced with the instant cases, where, in the Chicago, Burlington case two public streets, one much traveled, were crossed, and in the Gulf, Mobile case a public highway was crossed, the court still found no danger, apparently because no accident had yet occurred. To permit enforcement only after an accident on the particular stretch of track involved is hardly a proper manner in which to construe an Act designed to protect the public safety.

## CONCLUSION

That a law regarding the safety of railroad operations has been given so nebulous a meaning in a judicial circuit which embraces the important railroad center of Chicago is in itself sufficient to warrant the grant of certiorari in these cases. In addition, unless the misinterpretation of the decisions of this Court is corrected and the conflict with the decisions of the Second and other Circuits resolved, there is bound to be general confusion among the circuits as to the applicability of the Act, with consequent relaxation in compliance. The problem involves no mere disagreement as to particular factual situations. It arises from a substantial misconception of the entire required basis of decision.

It is therefore respectfully submitted that this Court should grant the petition for writ of certiorari.

WALTER J. CUMMINGS, JR.,
*Solicitor General.*

JANUARY, 1953.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1952.

**No. 550**

UNITED STATES OF AMERICA,
*Petitioner,*

*vs.*

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY AND GULF, MOBILE & OHIO RAILROAD COMPANY,
*Respondents.*

## RESPONDENT CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

ELDON MARTIN,
JOHN L. RICE,
ANDREW C. SCOTT,
*Counsel for Respondent.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1952.

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**No. 550.**

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UNITED STATES OF AMERICA,
*Petitioner,*

*vs.*

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY AND GULF, MOBILE & OHIO RAILROAD COMPANY,
*Respondents.*

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## RESPONDENT CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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### RECORD INCOMPLETE— MAP AND NINE PHOTOGRAPHS MISSING.

Petitioner failed to include in the record in the Court of Appeals and in this Court nine exhibits that were before the trial court at the time the findings of fact were made. Petitioner's Exhibit 1 was a large map showing the switch yards involved, together with the location of the various industries, freight house, shops and location where cars were assembled into trains at Eola (R. 13-15). This map was referred to by the government witness (R. 17) and by the court in connection with its analysis of the evidence (R. 45).

Respondent's Exhibits 1 to 8, inclusive, were a collection of photographs showing the location of the switching lead over which the switch movement in the Aurora-Eola yard occurred, and also the complete isolation of this switch yard from Respondent's main line tracks by virtue of the high fill on which the main-line tracks were located (R. 21-28). Exhibit 6 also showed the excellent view and the infrequency of travel over the only unprotected highway crossing (R. 24).

Where petitioner seeks to review the trial court's findings of fact, and fails to produce all the evidence before the trial court, especially where the omitted evidence consists of a map and photographs which cannot be adequately portrayed in the printed record, petitioner is not entitled to have a second review of the trial court's findings and conclusions, particularly where the trial court and the Court of Appeals have reached the same conclusion (Supreme Court Rule 10, Par. 3; *Sublette, et al.* v. *Servel, Inc.*, C. C. A. 8, 124 F. 2d 516, 517; *United States* v. *Title Guaranty & Trust Co.*, C. C. A. 6, 133 F. 2d 990, 995; *Howard* v. *Chicago, Burlington & Quincy R. Co.*, C. C. A. 8, 146 F. 2d 316; *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275). Accordingly, Respondent Chicago, Burlington & Quincy Railroad Company respectfully moves that the petition for certiorari herein be denied insofar as it seeks a review of case No. 10617 in the United States Court of Appeals.

**QUESTION PRESENTED.**

Whether the movement of a locomotive and 23 freight cars, for a distance of two miles, for the purpose of incorporating the cars into freight trains, involves a train movement or a switching operation—(1) where the movement is wholly within the switch limits of Respondents Aurora-Eola freight yard (R. 22, 32, 44; Findings 9, 11 and

13, R. 48-49); (2) over a switching lead track not used by main-line passenger or freight trains (R. 31-32); (3) where the switching lead track does not cross or intersect the tracks of any other railroad or the main line tracks of Respondent (Plaintiff's Ex. 1, omitted from the record, R. 45); (4) where the switching movement does not exceed ten miles an hour, the movement could as readily be controlled by the locomotive power brakes as by the automatic train brakes, and the automatic train brakes could not and would not be used, if available, because it would result in damaging the lading at such slow speeds (R. 31, 32, 33; Finding 4, R. 48); (5) where the movement was under the jurisdiction of a yardmaster and the operation was controlled by switch crews (R. 22, 20, 44, 45; Findings 10 and 14, R. 49-50); and (6) where, for 45 consecutive years, 1907-1952, the movement had been so effectively controlled by the locomotive power brakes that no one had ever been injured (R. 30, 32-33).

**STATEMENT.**

Respondent invites the court's attention to what it conceives to be two erroneous statements contained in petitioner's statement. The judgment of the trial court was based, in part, at least, on a finding that the movement from the freight house tracks to the tracks where trains were made up was within the confines of a single freight yard (R. 44), and the court directed preparation of findings of fact not inconsistent with the findings of the court contained on pages 44-45 of the record (R. 45). The court's language with respect to this being a movement within a single freight yard follows:

> "Here it was a movement of a locomotive and 23 cars by a yard crew, by means of a yard engine. They had no caboose with them. They had no flags on their engine or their last car to indicate the classification of the train which was moving. * * * *The movement was*

> *within the limit of one yard * * * I don't say that a train may not move within one yard. Of course, it can. But I say the fact that it was wholly within one yard is a matter to be considered in determining whether or not this was a train.* The movement was wholly within the Aurora-Eola yard." (R. 44.) (Emphasis supplied.)

Inasmuch as the court's judgment is obviously based, in part, on the foregoing language, and as that language of the court is supported by the testimony (R. 22, 31), it would seem that the judgment ought not be impaired by the statement in finding No. 3 that the movement occurred between the freight house yard and the Eola train yard (R. 47-48). Particularly where the foregoing language of finding 3 also conflicts with findings 11 and 12 (R. 49-50), wherein it is correctly stated that the movement began on the freight house tracks (Cyclopedia Federal Procedure (3rd Ed), Vol. 14, p. 182).

On page 6 of the petition, reference is made to finding 4 to the effect that the cars could be stopped as quickly with the locomotive brakes as with the power brakes "except in any emergency". While it is true that the quoted language appears at the end of finding 4, there is no evidence in the record to sustain this part of the finding. The evidence was that the speed of the movement was so slow it could be stopped as readily with the locomotive power brakes as with the automatic air brakes, and that the automatic air brakes would not be used if available because it would result in rough handling of the lading (R. 31, 32, 33).

**REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI.**

At pages 9-20 of the petition, counsel argue the writ should be granted because of an alleged conflict between the decision herein (199 F. 2d 223) and a previous decision of the Seventh Circuit (182 F. 2d 1) with an earlier decision of the Second Circuit (168 F. 2d 948). Petitioner also

claims the Seventh Circuit has failed to heed decisions of this court, and that that Circuit's decision herein conflicts with previous decisions of the Eighth Circuit (36 F. 2d 670 and 14 F. 2d 747) and the Ninth Circuit (60 F. 2d 864).

Nevertheless, when counsel for petitioner was presenting the same citations to the trial court in an effort to obtain a judgment that the movement herein was a "train" instead of a switching operation, he said:

> "I have cited various cases yesterday, and quoted from the opinions thereof as to the various factors that are considered in establishing this question and answering the question whether this is a switching or a train movement.
>
> "*No single case can be designated as completely in point, in that the factors or situations differ from case to case; therefore, it is necessary to bring out factors that have been determined by the various cases.* (Emphasis supplied.)
>
> "We have shown that the distance involved is not a controlling factor * * * also the question will arise whether the factor of switching took place before the movement starts, and did switching again take place after the movement reached its destination. That should be considered in determining this question. * * * The speed of the movement is not controlling. * * * The use of the main line is not essential to establish whether the movement is that of a train or merely switching. * * * In all of these cases there is this similarity, however. The fact that switching crews have handled these trains and in most cases the yardmasters have had control of the movements * * *. So all of these cases have come up on the issue of switch engines, and switch crews can perform train movements as well as switching movements. The use of that type of crew is not controlling or guiding. * * *
>
> "The question of stopping and setting out cars during some period from the beginning of the movement complained of to the end has arisen in numerous cases. * * * In a number of cases, this factor was disregarded

to the extent that the entire movement was looked at as a train movement.

"There has been some question in other courts, in other jurisdictions, indicating that switching took place which interrupted a train movement, therefore the entire movement may have been regarded as switching." (R. 40-41.)

Respondent believes counsel for petitioner was correct in advising the trial court that no previous decision of the Supreme Court or of any Court of Appeals compelled a decision herein that this was a train movement as distinguished from a switching operation. As counsel then pointed out, each decision rests on its own peculiar facts.

If the word "train", as used in the statute, had been given its ordinarily accepted meaning in the railroad industry, the problem presented would be readily solved by simply differentiating the operations handled by train crews from those handled by switch crews in the yards. But the courts went further and construed the word "train" so as to include many operations, otherwise switching in character, on the theory that such operations involved dangers that were sought to be eliminated by the statute. This extension of the statute by means of judicial construction has necessarily prevented the ruling in any one case being wholly applicable to the facts in another case. It was for this reason that counsel for petitioner advised the court no previous decision was wholly in point. For like reason, there can be no legal conflict between the circuits.

**This Court in Four Cases Has Determined the Principles Governing the Use of Air Brakes Under the Safety Appliance Act; and There Is Therefore No Occasion to Grant Certiorari in This Case in Order to Resolve a Supposed Conflict Between Circuits, Involving the Same Principles.**

The Government asks certiorari chiefly on the claims that the holding of the Seventh Circuit below differs from that of the Second, and that a decision of this Court is needed to settle the difference. The fundamental error in this contention is its disregard of the fact that the Supreme Court already has enunciated the rules of construction and application of the Air Brake Safety Appliance Act, rendering further consideration unnecessary. The meaning and application of the statute (45 U. S. C. A. Sec. 6) has been before the Court four times:

*United States* v. *Erie R. R.*, 237 U. S. 402.
*United States* v. *C. B. & Q. R. R.*, 237 U. S. 410.
*Louisville & J. Bridge Co.* v. *U. S.*, 249 U. S. 534.
*United States* v. *Northern Pac. Ry.*, 254 U. S. 251.

These decisions make plain that the question whether a given movement of a locomotive and cars constitutes a "train" within the meaning of the Act, depends on the "nature of the work done" (*Louisville, etc.*, 249 U. S. 534, 540). Thus, a "train" is not involved "where the operation is that of switching, classifying and assembling cars within railroad yards" (*Northern Pacific Ry.*, 254 U. S. 251, 254).

But, since work in and about yards and terminals embraces a multitude of varying circumstances, such as numbers of cars handled, distances moved, couplings and uncouplings made, streets crossed, main tracks and switch tracks used, speed employed, other movements encountered,

and so on, the question whether a given operation falls outside the domain of switching and constitutes a movement requiring air brakes as a "train" is one of fact, the Court in effect rules, to be determined in each case on its own evidence. To achieve the safety which this statute was designed to secure, this Court, in settling such question of fact in each case before it, has minutely inquired into the circumstances of the operation to see what the hazards and dangers were, in view of the character of the movement made.

Thus in the *Erie* case, 237 U. S. 402, 405, 406, 408, the Court was at pains to point out and consider the facts that the movement was of twenty-five cars, for three and one-half miles, at speeds from seven to eighteen miles an hour, between separate yards, over main line tracks used by other trains, through nearly a mile of very dark tunnel, over several switches leading to other tracks, and across other tracks at grade used daily by approximately thirty-five trains. Faced with these hazards, the Court concluded the movement was one requiring the safety of air brakes, and, therefore, one to be treated as a "train".

Again in the *C. B. & Q.* case, 237 U. S. 410, 411, 412, the Court deals at length with the facts of hazard, reciting that the three movements involved consisted of forty-two, thirty-six and thirty-nine cars, between yards two miles apart, lying on opposite sides of the Missouri River, connected by main line tracks, 3,000 feet of which was single track on the bridge and used by trains of the Rock Island, Wabash Railroads, as well as those of the C. B. & Q., and that off the bridge the tracks used passed through the tracks of the Union Depot, and intersected at grade twelve or fifteen tracks of other companies. Following the *Erie* decision, this Court held that the hazard and nature of the work done were such as to bring the operation within the purview of the air-brake provision.

In like manner in the *Louisville and Jefferson Bridge* case, 249 U. S. 534, 537, 538, in deciding the question of fact of "the essential nature of the work done", the Court inquires with detail into the evidence and points out that twenty-six cars were transferred three-fourths of a mile from one terminal into that of another company, moving part way along a main line, over connections with other tracks on which other engines and crews must have been working habitually, across four city streets at grade—one at fifteen miles per hour; that on leaving defendant's yard the group of cars entered upon a track of the Illinois Central used by the Big Four and Chesapeake & Ohio as main line; and that the movement was a back-and-forth operation, crossing three of the streets once, two of them twice, and one four times. On these facts the Court held that air brakes should have been used in order to secure the safety which it was the purpose of the Act to provide.

In the *Northern Pacific* decision, 254 U. S. 252, 253, the two movements involved were of forty and forty-eight cars for four miles between Rice's Point and Furnace. In deciding whether air brakes should have been coupled, the Court details the following additional facts as "material". Two segments of the run aggregating more than a mile were on single track; two streets were crossed at grade, one of which carried streetcars; five tracks of three independent railroad companies were crossed on which freight and passenger trains were operated; two other independent companies use about a mile of this road as a freight line to piers between Rice's Point and Furnace. At the two intermediate points of Berwind and Boston, cars are frequently picked up and set out on, respectively, tracks nine and six. Reviewing all these facts and citing the *C. B. & Q.* decision as to hazard, the Court held that power brakes should have been employed.

This review makes plain that the Supreme Court already

has fully set forth the guiding principles for determining when a given operation exceeds switching, classifying and assembling cars for the purpose of making up trains and becomes a movement requiring use of brakes to obtain the safety aimed at by Congress.

As the opinions of the Court demonstrate, these principles are that (1) the facts of each case must be examined by the trial court to ascertain "the essential nature of the work done"; that is, whether the same was switching, classifying or assembling cars, or something beyond that; and that (2) as an aid to reaching the answer to such inquiry, the hazards are to be looked to, in order to see whether in view of all the circumstances of the particular case air brakes were needed to provide the safety Congress sought. These principles have been so clearly and repeatedly set forth in the four decisions rendered that it would seem wholly unnecessary, and indeed a waste of the Court's time and energy, to grant certiorari in order again to repeat these rules. The lower Courts already have had the path laid out for them.

**Petitioner Has Already Had Two Trials, in Both of Which the Facts and Law Were Resolved Against It.**

If a train movement be viewed in the commonly-accepted meaning of the term in the railroad industry, there can be no question but what the movement involved herein is a switching movement and not a train operation. The movement occurred wholly within the Aurora-Eola freight yard, was under the jurisdiction of a single yardmaster, was wholly manned by switch crews, switching occurred at both the beginning and the termination of the movement, and the purpose of the movement was to move the cars from the freight house tracks to the point where they would be incorporated into outgoing trains (R. 44-45; Findings 11 and

13, R. 49-50). Under similar circumstances, the Court of Appeals for the Ninth Circuit in *United States* v. *Great Northern Ry. Co.*, 73 F. 2d 736, declined to permit the government to isolate the switching movements at each end so as to convert the intermediate switching operation into a train movement. Moreover, this court declined to grant a petition for certiorari, although practically everything said herein as a basis for granting the writ could have been said as a basis for granting the writ in the foregoing decision by the Ninth Circuit. That is to say, it could have been said that the opinion of the Ninth Circuit in 73 F. 2d 736 was in conflict with *United States* v. *Southern Pac. Co.*, 60 F. 2d 864 (C. C. A. 9); *Chicago, St. P., M. & O. Ry. Co.* v. *United States*, 36 F. 2d 670 (C. C. A. 8), and *Illinois Central R. Co.* v. *United States*, 14 F. 2d 747 (C. C. A. 8), as petitioner has claimed with respect to the decision herein of the Seventh Circuit at pp. 11-12 of its petition.

But this court should deny the petition herein for the same reason that it was denied in *United States* v. *Great Northern Ry. Co.*, C. C. A. 9, 73 F. 2d 736, certiorari denied 295 U. S. 752, because the determination of whether or not any given switching movement should be treated as a train movement involves the weighing and considering of a multitude of facts and details which not only vary from case to case, but which necessarily limit the application of any final determination in any particular case.

Where a plaintiff has enjoyed the benefit of two trials on the facts and the law, and has lost both trials, and where petitioner has brought up an incomplete and unsatisfactory record for review, it would hardly appear to be appropriate for this court to issue the writ for the purpose of according a third trial on the facts and the law. As this court has said "A court of law, such as this court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts

below in the absence of a very obvious and exceptional showing of error. *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac Co.*, 321 U. S. 275; *District of Columbia* v. *Pace*, 320 U. S. 698; *Williams Mfg. Co.* v. *United Shoe Machinery Corp.*, 316 U. S. 364; *Baker* v. *Schofield*, 243 U. S. 114, 118." (*Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, at 275.)

There would appear to be special merit in applying the foregoing principle herein where the switching operation involved has been continuously performed for a period of 45 years without anyone's having sustained physical injury of any kind or character (R. 30, 32, 33). Even if there were a conflict between the circuits, the problem is not sufficiently important to grant the petition (see "Denial of Certiorari Despite a Conflict," by Robt. L. Stern, 66 Harvard Law Review 465-472).

Respondent respectfully submits the petition for a writ of certiorari herein, insofar as it relates to the record below in case No. 10617, should be denied.

Respectfully submitted,

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No. 550

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

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UNITED STATES OF AMERICA,

*Petitioner,*

*versus*

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY AND GULF, MOBILE & OHIO RAILROAD COMPANY.

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**SEPARATE ANSWER OF RESPONDENT, GULF, MOBILE AND OHIO RAILROAD COMPANY, TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.**

---

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# No. 550

IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1952**

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UNITED STATES OF AMERICA,

*Petitioner,*

*versus*

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY AND GULF, MOBILE & OHIO RAILROAD COMPANY.

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**SEPARATE ANSWER OF RESPONDENT, GULF, MOBILE AND OHIO RAILROAD COMPANY, TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.**

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## STATEMENT

The statement, by Petitioner, relating to the Respondent, Gulf, Mobile and Ohio Railroad Company, omits several salient facts which appear to have been quite persuasive upon the lower courts in reaching the conclusion that only a switching operation was involved, which we here supply:

The movement, in question, took place in the yards of the Respondent, located at Venice, Illinois. It contained numerous tracks for the conduct of its switching operations and was made up of three subdivisions

which included the Venice Yard on the North, the Brooklyn Yard, adjacent to it on the South and the Middle Yard, which was adjacent to, and South of the Brooklyn Yard. (R. G. 16.) The Venice Yard is a classification yard and the Brooklyn Yard is where the Respondent accepts deliveries and makes up trains, and the same is true of the Middle Yard. (R. G. 23.) The particular movement, of which complaint was made, consisted of thirty-three freight cars from the Venice Yards through the Brooklyn Yards to the South end of the Middle Yard, a distance of one and one-half miles. (R. G. 9, 26.) In routing this particular movement the yardmaster does and may send it over any one of fifteen tracks in the Brooklyn Yard. (R. G. 31.) The movement is not made on any regular schedule and is only made when there are enough cars to warrant the use of an engine and crew to make the transfer. The movement, complained of, was drawn by a switch engine on December 4, 1950, and did not move under any train orders, (R. G. 18), but was entirely a yard movement. (R. G. 19.) *It was stipulated that this movement was within yard limits and under yard rules.* (R. G. 19.) While it is true there was no finding that there was any communication from the yardmaster during this particular movement, the trial Court did find that the Respondent's operations in the yards, including the movement complained of, and all similar movements, were carried on under the supervision of a yardmaster located in a tower in the yards who had visual control of the movement, and throughout the yards there was an intercommunication system which permitted him to constantly control it. (Finding No. 3, R. G. 41.) The cars that were included in this particular movement came to the Venice Yards from four separate freight trains that had terminated in the Venice Yards and were designated for other railroads,

(R. G. 35), and they were transferred by this movement to the Terminal Railroad Association *within* yard limits. (R. G. 19.) The cut of cars was assembled not over forty or fifty feet North of a public highway, having a crossing watchman, with the engine thirty to forty feet from the edge of the pavement, before it started the movement across the paved street, and it moved at the rate of approximately three miles per hour. (R. G. 19.) It did not cross any other highway and did not cross the line of any railroad, nor did it cross the main line of the Respondent. (R. G. 20.)

## ARGUMENT

We do not believe that the Court of Appeals for the Seventh Circuit has reached opposite results from other circuits in cases with similar facts, as is contended by Petitioner. Upon examination of the record in this cause and the opinion below, it is apparent that the Court of Appeals gave consideration to, and followed, four decisions of this Honorable Court construing the application of the Safety Appliance Act. In the instant case the Court of Appeals relied upon its previous decision in *United States v. Elgin, J. & E. Ry. Co.*, 182 F. 2d 1. In the latter case the Court considered the four cases relied upon so heavily by the Petitioner herein, which were *United States v. Erie Railroad Company*, 237 U. S. 402, *United States v. Chicago, Burlington & Quincy Railroad Company*, 237 U. S. 410, *Louisville & Jeffersonville Bridge Company v. United States*, 249 U. S. 534, and *United States v. Northern Pacific Railway Company*, 254 U. S. 251.

The air brakes law was obviously passed by Congress to provide for the safe control of a train, as it is a matter of common knowledge that in the ordinary train movement a number of hazards are encountered which may require the sudden use of brakes which can only be effectually applied by air, under the control of the engineer and that, conversely, no such occasion, requiring air brakes, arises in the ordinary switching movement. These hazards have been considered in other opinions and include the crossing of highways, both public and private, the crossing of mainlines of other railroads, the running upon the mainline tracks of railroads, the operation at great distances where there is no visual supervision or control other than that of the train crew, and operations at high speed.

This Court in *United States v. Erie Railroad Company,* 237 U. S. 402, 407, construed the Safety Appliance Act when it stated that a train movement is within the operation of the Air Brakes Act and that a mere switching movement is not.

In that case it was found that the movement was that of a train because it used mainlines as other trains and was exposed to hazards which made it essential that appliances be at hand for readily checking and controlling the movement.

In the same year that the *Erie* Case was decided, this Court in *United States v. Chicago, Burlington & Quincy Railroad Company,* 237 U. S. 410, found that a movement of approximately two miles across a single track bridge spanning the Missouri River, intersecting at grade 12 or 15 tracks of other companies, passing through the Union Depot tracks and upon the same line, which passenger trains and freight trains of other railroads used, was a train movement within the meaning of the Act. The Court, in finding this to be a train movement, again considered whether or not the hazards usually found in connection with train movements were present, and the Court, finding that the hazards common to train movements were present, held that the Safety Appliance Act applied.

In *Louisville & Jeffersonville Bridge Company v. United States,* 249 U. S. 534, the Court again considered the hazards common to train movements in finding that a movement of a train of cars of 1100 feet in length for a distance of three-quarters of a mile crossing at grade, three city streets, two of them twice, one of them three times, a main track movement of 2600 feet with two stops and starts on the main track, was a train movement within the meaning of the Act. The train moved at a speed of 15 miles per hour.

In *United States v. Northern Pacific Railway Company*, 254 U.S. 251, the Court, in finding a train movement was involved, said, at page 253:

> "These additional facts are material: The road for a distance of a mile at the beginning and for less at the end is single track. It crosses at grade two streets on one of which run street cars. It crosses at grade, at five places in all, lines of three independent railroad companies which run freight trains to piers situated between Rice's Point and Furnace. One of these companies also runs passenger trains across defendant's tracks. In addition, two other independent companies use, under the usual traffic-right agreements, about a mile of this railroad as a part of their freight lines to piers situated between Rice's Point and Furnace."
>
> * * * * *
>
> "Not only were these (the defendant's) trains exposed to the hazards which that provision was intended to avoid or minimize, but, unless their engineers were able readily and quickly to check or control their movements, they were a serious menace to the safety of other trains which the statute was equally designed to protect." (p. 254)

This Court has stated in the foregoing cases that the controlling test of the statute's application lies in the essential nature of the work done, and the Court has, in determining the character of a particular movement, considered whether it had the hazards common to a train movement, which the statute was designed to control, namely, whether or not the movement was such that there were hazards that would require immediate application of effective brakes which could only be done by air in charge of the engineer.

In the instant case, the movement started 50 feet from a public highway crossing, which was protected by a cross-

ing watchman, and crossed the highway at the rate of 3 miles per hour, did not touch the main line track of any railroad, and proceeded along one of 15 different switching tracks, according to the directions of the yard-master. After crossing the highway, the movement proceeded at approximately four to five miles per hour and covered the distance of approximately one and one-half miles within the yards, consuming the time of thirty-nine minutes, the entire movement being under the supervision of a yard-master in a tower in the yard, who not only had visual supervision of the movement throughout the yard, but who had control of the movement through an intercommunication system which allowed him to page the switching crew by means of loud speakers on tall poles spaced throughout the yards. There was also provided means of talk-back whereby any member of the switching crew from short intervals along the tracks could talk back to the yard-master. The movement was a result of four freight trains terminating in the yards of the Respondent, the cars involved being destined for various railroads, but being switched by the Respondent upon switching tracks to the adjoining yards of the Terminal Railroad Association, but yet *witihin* yard limits. (R. G. 41-42.) The very purpose of the Respondent's yards was to receive and break up trains for further transfer of cars and to make up trains to be dispatched along the road. No trains, either passenger or freight, passed through the Defendant's yard. This Court, in *United States v. Erie Railroad Company*, 237 U. S. 402, 408, has defined this to be a switching movement, in the following language:

> "But it is otherwise with the various movements in railroad yards whereby cars are assembled and coupled into outgoing trains, and whereby incoming trains which have completed their run are broken up. These are not train movements, but mere switching

operations, and so are not within the air-brake provision."

We submit that the Court below followed this language in reaching its decision in *United States v. Elgin, J. & E. Ry. Co.*, 182 Fed. 2d 1, and in the instant case.

Although the Petitioner (Petition, p. 12) states that it is apparent that the Safety Appliance Act is not being applied to railroads in the Seventh Circuit, the opinions rendered in the Seventh Circuit not only show this statement to be untrue, but that the Seventh Circuit has given careful consideration to the Safety Appliance Act and the decisions of this Court construing it.

A few excerpts from the opinions rendered in safety appliances cases from the several circuits show that any diversity in their conclusions arises from the facts rather than any misapplication of the law:

*United States* v. *Southern Pacific Co.*, 60 F. 2d. 864, 865, (CA 9): "8 city streets are crossed at grade."

*Chicago St. P., M. & O. Railway Company,* v. *United States,* 36 Fed. 2d. 670, (CA 8): "Four city streets used by the public were crossed, and two tracks of other railroads, not used for main line traffic, were crossed."

*Illinois Central R. Co. v. U. S.* (8th Cir.), 14 F. 2d 747: (p. 748) "* * This movement was through the business or warehouse part of the City. * * * The plat shows that this particular track intersects at grade Nicholas and Fourteenth streets, much used by trucks and other traffic; that Webster and Cass streets, used by employees of the Union Pacific Railroad going to and from the railroad shops, were crossed at grade, as well as some switch tracks of the Chicago & St. Paul Railroad at Fourteenth street, and the Missouri Pacific tracks at California street; also that a portion of this

track between Webster and California streets was jointly used by defendant and the former road."

(P. 749) "* * The streets of a busy city and tracks of other railroads were crossed at grade, and there was ever present the probability that the train might, at any time, have to be stopped suddenly to avoid an accident. This could not be done without the use of train brakes. There was a serious danger, not only to the crew of this particular train, but to the public and other trains and employees as well, which it was the object of the law to minimize as far as possible.

"* * As we have already shown, this so-called Grace street yard was divided into two sets of switching tracks, a considerable distance apart, and connected by a single lead track, from which the public was not excluded. This part of the yard, at least, was used by other railroads, and was not the private property of the plaintiff in error."

We submit that the movement, in question, was a mere switching operation within the language of this Court as set forth in *United States* v. *Erie Railroad,* 237 U. S. 402, 408 and that each case must be decided upon the factual situation before it, in the light of the rules laid down by this court; that if the several circuits have reached different conclusions that it is because of the difference in the facts before them rather than a difference of opinion as to the applicable law and that so long as the courts consider the essential nature of the work done that their conclusions will be governed by the facts before them in each case that is presented.

The Respondent, GULF, MOBILE AND OHIO RAILROAD COMPANY, cannot agree with the contention of the Petitioner that the law regarding the safety of railroad operations has been given a nebulous meaning in the Seventh Circuit, or that the fact that the Seventh Circuit

embraces the railroad center of Chicago, in itself is sufficient to warrant the grant of certiorari in this case. An examination of the decisions of the several circuits will disclose that the diversity of their opinions as to what are train movements arises, in each instance, out of the difference in the particular factual situation under consideration rather than any misconception of the law. We believe that the facts of each case must govern the Court in determining what may be a train or a mere switching operation. The opinion of the Second Circuit in the case of *United States v. South Buffalo R. Co.*, 168 Fed. 2d 948, upon which Petitioner heavily relies, discloses a situation wholly unlike that presented in the instant case. The facts which distinguish it are stated as follows: (950)

> "* * This crossing was protected by a guard and was used by employees and business visitors of that company but there was uncontradicted evidence that a considerable number of people crossed the tracks there, particularly at the beginning of the morning and at the end of the day when the plant closed. There is further evidence by an inspector of safety appliances for the Interstate Commerce Commission who had had thirty-two years railroad experience, that there was grave danger in moving these cuts of cars over the grades involved in the movements without having the air brakes hooked up. * * * *"

In the case of *United States v. Elgin J & E Ry. Co.*, 182 Fed. 2d 1 (CCA 7), and in the instant case, there was no evidence tending to show any such hazards as were present in the *South Buffalo* case and the Seventh Circuit in applying the law laid down in *United States v. Erie R. R. Co.*, 237 U. S. 402, 408, properly found that there was no train movement involved within the meaning of the Act. There was not involved any grade, in the instant case, over which the movement, in question, passed, nor was there present a situation similar to that of the South Buffalo case. Had

there been, the Seventh Circuit would, undoubtedly, have reached the same conclusion as the Second Circuit in finding that a train movement was involved. We desire to point out that the Seventh Circuit had no hesitancy in finding that a train movement was involved under more compelling facts in the case of *Chicago & Erie R. Co. v. United States,* 22 Fed. 2d 729. The decisions of the several circuits are based upon the factual situations before them and they are not in conflict with each other as to the law. There is, therefore, no need for this Court to again consider the air brake sections of the Safety Appliance Act. In omitting any definition of a "train" in the enactment of the Safety Appliance Act, Congress clearly recognized that the application of the air brake provisions would in every instance be dependant upon the facts, and intended that it should be.

For the reasons above set forth it is respectfully submitted that this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1952

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No. 550

UNITED STATES OF AMERICA, PETITIONER

*v.*

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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**REPLY MEMORANDUM FOR THE UNITED STATES**

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The respondent, Chicago, Burlington & Quincy Railroad Company, opens its brief in opposition with an objection to the failure of the Government to include in the record nine exhibits. The first of these (Pet.'s Exh. 1, R. 13) was a large map of the trackage involved. The other eight exhibits (Respondent's Exhs. 1-8, R. 22-25, 28) were photographs of the track. Upon receiving the brief in opposition, petitioner wrote respondent, offering to stipulate that the documents in question, which had not been certified to the court of appeals, be treated as part of the record in the Supreme Court. Respondent's counsel has declined so to stipulate,

though forwarding the photographic exhibits, and stating that he is "willing that you make any use of same to which you are entitled under the law and the Federal rules." Copies of this correspondence are on file with the Clerk.

It appears that the map, although never formally introduced in evidence (having been marked only for identification, R. 13), was used as the basis for the examination of the witnesses during the trial (R. 13-17), and indeed was referred to and relied upon in the district court's opinion (R. 45). Since the district court, with the obvious consent of the parties, took notice of the map, even though it was not introduced in evidence, the appellate courts are, we submit, entitled similarly to take judicial notice of it. The map accordingly is filed herewith for such use as the Court may feel to be appropriate.

Although the map is extremely bulky and cumbersome, we hope the Court will examine it, for it shows—much more effectively than can any descriptive statement such as is found in the petition for certiorari—that the track in question (the red line) is a single track, paralleling three main tracks, between two areas containing large numbers of tracks which would commonly be called yards. This shows that the case is indistinguishable from *United States* v. *Southern Pacific Co.*, 60 F. 2d 864 (C. A. 9), certiorari denied, 287 U. S. 667; *Chicago, St. P., M. & O. Railway Co.* v. *United States,* 36 F. 2d 670 (C. A. 8); and *Illinois Central R. Co.* v. *United States,* 14 F. 2d 747 (C. A. 8),

certiorari denied, 273 U. S. 752, cited on page 11 of our petition as being in conflict with the decision of the court below.

We also are filing herewith the eight photographic exhibits introduced by the respondent which *neither* party sought to have certified to the Court of Appeals.

Respectfully submitted,

Robert L. Stern

*Acting Solicitor General.*

MARCH 1953.

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